Testimony SB 332 February 3, 2010
Companion Bill AB 508 To: Assembly Committee on Children and Families

Dear Legislators:
I've already made clear my approval of Senate Bill 332 in a prior letter to the legislature. I'd like to remind this committee of the reasons for that support today.

This proposal makes two significant changes to current statutes regarding child custody recommendations provided to judges in family court. First, psychologists, mediators, family court counselors, guardians-ad-litem and custody evaluators will be required to provide copies of their reports and recommendations to all parties at least 10 days before a final hearing. Also, these third-party experts will have to present their reports in person, in court, and respond to questions and challenges from parents who might dispute them for good reasons. The value of these two procedural points can't be over-stated, because they offer time and opportunity for full consideration of every parent's opinions in a decision that defines their very relationship with their children after a family breakup.

Child-centered issues among divorced, never-married or paternity parents are often fraught with volatile emotions. In this kind of conflict and competition for preferred custody, these same feelings can lead to lies, inventions or exaggerations, as parents and their attorneys engage one another under stressful conditions. We're also well aware that they commit lots of other bad behavior when they're not in court. In spite of themselves, these parents deserve to be timely advised of any information affecting them and to confront those who criticize their fitness as caretakers of their children.

We're several decades into the no-fault divorce era now. The priorities of third-party professionals whose reports influence judges' decisions, however, are anything but no-fault. All the more reason to approve SB 332, especially so that all parents are assured of fair and full participation in promoting their interest in their children. Every other area of law allows for those accused or evaluated to present their own best case; family law should be no different.

I strongly encourage your passage of this proposal today. Thank you for your interest and support of this movement toward equality in the family courts.

Sincerely, Joseph Vaughn

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TO: Assembly Committee on Children and Families

FROM: Bob Andersen

RE: AB 508/SB 332, relating to submitting custody reports to the parties and offering custody study reports in accordance with the rules of evidence

DATE: February 3, 2010

AB 508/SB 332 simply requires that custody studies reports in family law actions be introduced in accordance with the rules of evidence, so that the parties may have a chance to ask the person who made the report how the recommendations were made. Under current law, the statute says only that the reports are to be given to the courts and that the courts may make the reports a part of the record. AB 508/SB 332 provides that the reports must be given to the parties and the court 10 days in advance of the hearing.

While this is a small bill, it relates to a subject matter that has ***profound importance*** – because it relates to studies and reports that are made that can determine how ***physical placement*** and ***legal custody*** over ***children are to be divided between the parents in a family law action***. While it is a small bill, it makes vitally important changes in the law.

This is a bill that passed the Assembly unanimously last session, but that raised a concern that prevented its passage. That concern has now been resolved by AB 508/SB 332.

The Office of the Director of State Courts was concerned that the recommendations from custody studies could not be made available to the courts until those recommendations were introduced in evidence. Their concern was that this would delay the process. Consequently, the proposal has been amended to provide that the recommendations must be given to the courts, as well as the parties,10 days in advance of the hearing. Under the amendment, the courts may review the recommendations but may not rely upon the reports as evidence until the reports are introduced in accordance with the rules of evidence. This amendment has been reviewed by the Office of the Director of State Courts and their legislative committee and they now remove their objections to the bill.

This is a bill that is supported by the broad range of diverse interest groups that get involved in family law legislation: LAW, the Wisconsin Coalition Against Domestic Violence, the Family Law Section of the State Bar and organizations that represent the interests of fathers.

1. **Under Current Law, Recommendations Regarding Legal Custody and Physical Placement in Family Law Actions May Be Automatically Incorporated in the Record, Without Giving Either of the Parties the Opportunity to Question How Those Recommendations Came About.**

Current s. 767.405 (14)(a) and (b) provide as follows:

(14) Legal custody and physical placement study.

(a) ***A county or 2 or more contiguous counties shall provide legal custody and physical placement study services.*** The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, ***the court may order a person or entity designated by the county to investigate the following matters relating to the parties:***

1. The conditions of the child's home.

2. Each party's performance of parental duties and responsibilities relating to the child.

3. Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

4. Any other matter relevant to the best interest of the child.

(b) The person or entity investigating the parties under par. (a) shall complete the investigation and submit the results to the court. The court shall make the results available to both parties. The report shall be a part of the record in the action unless the court orders otherwise.

Under par. (b), the results of the investigation are to be submitted to the court. There is no provision for the parties to question the person who conducted the investigation or made the report. The court can automatically make this report a part of the record.

2. **AB 508/SB332 Would Amend Paragraph (14)(b) to Require that the Report be Given to the Parties 10 days in Advance, to Require that the Investigator Who Made the Report Introduce the Report in Evidence, and to Allow the Parties to Question the Investigator About the Contents of the Report.**

The bill achieves two very important reforms:

- It requires that the report be introduced in accordance with the rules of evidence,

which means that the person who conducted the report must appear in court to explain how the recommendations were arrived at and the parties are given the opportunity to question the person.

- It requires that the parties be given the report 10 days in advance, so that the parties have time to examine the basis for the recommendations and to obtain evidence that is relevant to those recommendations.

3. **The Custody and Placement Studies are Conducted by a Family Court Services Office or by Any Person or Public or Private Entity Contracted with by the Director of Family Court Services**

Under s. 767.405 (14) (a), the custody and placement studies may be performed by the entities described above, as is the case for mediation. Each county – or two or more contiguous counties – appoints a Director of Family Court Services. A person who conducted mediation may not engage in the custody and placement investigation under this section, "unless each party personally so consents by written stipulation after mediation has ended and after receiving notice from the person who provided mediation that consent waives the inadmissibility of communications in mediation under s. 904.085."

4. **The Interests at Stake for the Parties are Profound as The Recommendations of the Studies Can Influence or Determine Who Will Have Legal Custody and Who Will Have Physical Placement for What Period of Time.**

The definitions of legal custody and physical placement show how profound those interests are. They highlight the importance of the recommendations that are being made.

Under 767.001(2), "Legal custody" means:

> (a) With respect to any person granted legal custody of a child, other than a county agency or a licensed child welfare agency under par. (b), the right and responsibility to make ***major decisions*** concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

Under 767.001(2m) "Major decisions" means

> (2m) ***"Major decisions"*** includes, ***but is not limited to***, decisions regarding ***consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for non emergency health care and choice of school and religion.***

Under 767.001(5) "Physical Placement" means

(5) ***"Physical placement"*** means the condition under which a party has the ***right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care,*** consistent with major decisions made by a person having legal custody.

Legal custody and physical placement can be sole or joint or shared in any manner of ways.

5. **The Investigation Required by the Statute is All-Encompassing**

Under the statute, the entity is to investigate all of the following in investigating the parties. These are significant matters.

- ***The conditions of the child's home.***
- ***Each party's performance of parental duties and responsibilities relating to the child.***
- ***Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).***
- ***Any other matter relevant to the best interest of the child.***

This covers the gamut of circumstances that involve the parents' lives and the lives of their children.

In addition, under s. 767.41 (5), all of the following factors have to be taken into consideration in awarding legal custody and physical placement, so the entity doing the custody and placement investigation will be involved in a broad investigation.

- The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
- The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
- The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
- The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable

life-style changes that a parent proposes to make to be able to spend time with the child in the future.

- The child's adjustment to the home, school, religion and community.

- The age of the child and the child's developmental and educational needs at different ages.

- Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.

- The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

- The availability of public or private child care services.

- The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

- Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

- Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02 (2).

- Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122 (1) (a), of the child or any other child or neglected the child or any other child:

  a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).

  b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

- Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).

- Whether either party has or had a significant problem with alcohol or drug abuse. The reports of appropriate professionals if admitted into evidence.

- Such other factors as the court may in each individual case determine to be relevant.

6. **AB 508/SB 332 Would Require that the Person Who Conducted the Investigation Offer the Report as Evidence So that the Person Could be Questioned About How the Recommendations Were Arrived At.**

The person who conducts the investigation will be contacting people and examining court records to assess what recommendations should be made regarding legal custody and physical placement. The person will be looking at the list of factors that appear above, under section 767.41 (5).

As a result, the investigator will be talking to the parents, children, relatives, neighbors, friends, teachers, clergy, psychologists, doctors, probation officers and any other people, in order to make a recommendation about what is best for the children, what is best for their well-being and what is best for their adjustment.

The investigator becomes an expert witness who is basing an opinion or inference on facts or data made known to the investigator at or before the hearing. If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be separately admissible as evidence. Wis. Stat. 907.03. This means that the investigator can rely on the information the investigator received from third parties or from documents, without requiring the third parties to appear in court or the documents being separately authenticated.

The parties in turn will be able to question the investigator about:

- the protocol followed by the investigator, as compared with the usual protocol used in a particular case
- the information received from 3rd parties which formed the basis for the recommendations being made
- documents which were involved in the process, such as a domestic abuse restraining order
- the training that the investigator has in assessing factors that are listed in the statutes
- and information which the investigator may not have received

7. **By Receiving the Report 10 Days in Advance, the Parties Will be Able to Assess the Recommendations that are Made, Assess the Evidence Upon Which Those Recommendations are Made, and Prepare Evidence that May be Submitted to Challenge Some of Those Recommendations and Matters of Evidence.**

8. **These are Profound Interests for Parents that Will be Affected by Judgments and Orders that Are Not Easily Undone.**

These are profound interests for parents. Without any question being given to these recommendations, the court may simply incorporate the recommendations into the

record. Those recommendations will likely result in orders and judgments being entered to enforce the recommendations. Once judgments or orders are entered, they are difficult to undo at a later stage.

Under s. 767.451, legal custody and physical placement orders may not be revised within two years after they are initially entered, unless a party can show by substantial evidence that a modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.

After two years, these same orders may not be modified unless there is a change in circumstances that is substantial enough to overcome a presumption that favors the current allocation of custody and placement – in the best interest of the children. A change in economic circumstances or marital status of either party is not sufficient to meet the standards for modification.

In the end, the safeguards proposed by AB 508/SB 332 are just a matter of simple fairness.

DONNA SEIDEL
STATE REPRESENTATIVE
85TH ASSEMBLY DISTRICT

Testimony of Rep. Donna Seidel
Assembly Bill 508/Senate Bill 332
Assembly Committee on Children and Families
February 3, 2010

Good morning Chairwoman Grigsby and fellow committee members. Thank you for this opportunity to testify in support of AB 508 and SB 332.

While the components of this legislation are fairly simple, this bill will have a profound impact on families across the state as it relates to the legal custody and physical placement of children. As you all know, the term "legal custody" refers to a parent's ability to make major life decisions on behalf of a child, while the term "physical placement" refers to a parent's ability to spend time with their child and under what conditions. Under current law, absent an agreement by the parties, legal custody and physical placement orders for children in family court actions are largely determined by court studies. In most cases, these orders will remain in effect for many years due to the fact that state law requires a parent to show a change is necessary to protect the best interests of the child to have the order modified.

Given the importance that these custody studies have, it is surprising that under current law, parents are not afforded with the opportunity to find out how these recommendations were made. Due to the fact that custody studies are not required to be introduced in accordance with the rules of evidence, the person who prepares the report is not required to defend their conclusions to parents or to the court. Instead, custody studies are generally accepted into the court record as a matter of course.

This bill will simply require custody study recommendations to be introduced in accordance with the rules of evidence, meaning that the person who made the report will be required to appear in court to answer questions that the parents may have regarding how the recommendations were arrived at. Further, the bill will require the individual who prepared the report to submit it to both the court and the parents 10 days in advance of a final hearing. Given the profound impact that these recommendations will have on families, it only makes sense that we would subject them to some modicum of review.

This piece of legislation has received broad support and passed the Assembly unanimously last session. Late last month, it passed the Senate unanimously after several changes were made to last session's bill to address concerns related to potential delays it could have on our court system.

Thank you for your attention to this legislation. I would now like to introduce Bob Anderson from Legal Action of Wisconsin.

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Testimony before the
Assembly Committee on Children and Families

AB-508/SB332

February 3, 2010
Submitted by
Steve Blake
Representing
Dads of Wisconsin

My name is Steve Blake and I am the president of Dads of Wisconsin. We support this bill and urge the committee to recommend its passage.

Custody studies in divorce cases or placement disputes have such a profound impact on the fundamental liberty interests of parents to the care, custody and control of their children that I find it surprising that they have not been subject to the rules of evidence already. Those who prepare custody studies need to explain how and why they have made the recommendations that they have and certainly should have to answer questions that a parent or their counsel may have concerning the method used and the circumstances that led to the conclusions reached.

It is definitely in the best interest of children that each parent has the opportunity to participate as fully as possible in their care and upbringing and if a custody evaluator recommends differently they should have to give a full accounting as to why their recommendations find that it is not.

Dads of Wisconsin believes that all children need and deserve to have both parents equally involved in their lives regardless of marital status. Anything that interferes with that concept should be subject to the closest possible scrutiny. Therefore my organization urges this committee to recommend passage of AB-508.

Respectfully submitted,

Steve Blake
President
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Testimony

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To: Members of the Assembly Committee on Children and Families

From: Tony Gibart, Policy Coordinator, Wisconsin Coalition Against Domestic Violence

Date: Wednesday, February 3, 2010

Re: Testimony in support of Assembly Bill 508

Thank you for providing an opportunity to submit testimony in support of AB 508, and thank you to Representative Seidel and Senator Taylor for sponsoring this legislation. I represent the Wisconsin Coalition Against Domestic Violence (WCADV), the statewide voice for victims of domestic violence and the local programs in every county of our state that serve them.

Each year thousands of domestic violence victims in Wisconsin make the decision to break out of abusive relationships and achieve safety for themselves and their children. Over the years, the Wisconsin State Legislature has acknowledged domestic violence is relevant to important questions of family law. In 2003, the Legislature passed Act 130. One of the central provisions of 2003 Act 130 is a requirement that the court be informed if domestic violence has occurred in the family. This was one of the most significant reforms our Legislature has made to help courts understand the dynamics of domestic violence in custody disputes and its impact on children.

However, since that time, victims and advocates report that courts are not getting accurate information about domestic violence and how it impacts particular families. Our advocates across the state are seeing case after case in which guardian ad litems and custody evaluators misunderstand the dynamics of families or rely on inaccurate or unscientific studies or labels in conducting their assessments. WCADV supports AB 508 because it will help ensure that custody studies are treated with a level of consistency and scrutiny across the state. WCADV believes setting clearer expectations will assist courts in reaching conclusions based on fact. With a more rigorous fact-finding process in place, laws designed to protect victims and children can be applied in the spirit, and with the purpose, with which they were intended.

WCADV also supports the bill because it will require that custody studies be submitted to the parties in advance of being introduced into evidence. This will give parties necessary time to review and contest findings and better educate the court about the facts of their situations. This is especially important when the custody evaluation fails to properly account for domestic violence and its traumatic impact on children.

Thank you for your time and for the opportunity to submit testimony. If you have questions, please feel free to contact me at 608.255.0539 or tonyg@wcadv.org